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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 135

ESTATE OF A. M. WILDER, DECEASED, JOSEPHINE U. WILDER, EXECUTRIX,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

W. W. SPALDING,
Counsel for Petitioner.

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COMMISSIONER OF INTERNAL REVENUE.

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associated Justices of the Supreme Court of the United States:

The petitioner, Estate of A. M. Wilder, Deceased, Josephine U. Wilder, Executrix of said estate, now presents this, its petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Fifth Circuit, which reversed the decision of the Board of Tax Appeals in the proceeding of this petitioner against the Commissioner of Internal Revenue. The opinion of the Circuit Court of Appeals for the Fifth Circuit in this case is reported in 118 F. (2d) 281. It appears at pages 51 to 54 of the Record.

This proceeding involves the alleged liability of petitioner

for additional Federal estate taxes asserted against it by the Commissioner of Internal Revenue.

Accompanying this petition is a certified transcript of the record below, consisting of pleadings, findings of fact and decision of the Board of Tax Appeals, statement of evidence, together with the proceedings and opinion of the Circuit Court of Appeals.

Jurisdiction.

(a) The jurisdiction of this Court under Section 240 of the Judicial Code as amended is invoked. The decision sought to be reviewed is that of a Circuit Court of Appeals.

(b) The date of the decree of the Circuit Court of Appeals sought to be reviewed is March 20, 1941 (R. 55). The petition for certiorari was filed in this Court on June 6th, 1941.

(c) This is an action originating in the United States Board of Tax Appeals, involving the power of the Commissioner of Internal Revenue to assess and collect additional estate taxes from this petitioner.

Question Presented.

The question involved in this case is this: Should there be included in the taxable estate of the decedent, for estate tax purposes, one-half of the value of certain annuity contracts purchased by the decedent from an insurance company with funds of the community, the decedent receiving the annuity for his life and the surviving spouse for her life?

Summary of Matters Involved.

The decedent is the late A. M. Wilder, who died a citizen and resident of Shreveport, Louisiana, on May 19, 1937. The petitioner, Josephine U. Wilder, is the executrix of his estate.

On July 5, 1934, December 5, 1934, December 5, 1934, and March 12, 1936, decedent purchased from the New York Life Insurance Company of New York four annuity contracts of the type known as joint and survivor annuity policies. These contracts provide for the monthly payment by the Insurance Company of $500 for the four contracts. These monthly payments were to be made to the decedent during his life, and thereafter to his widow, Josephine U. Wilder.

This case was tried at the Board of Tax Appeals principally upon a stipulation of facts. It is recited in the stipulation that each of the contracts just mentioned was paid for out of community funds of decedent and wife.

A copy of each contract is made part of the stipulation. Each of them is substantially the same, and one of them, only, will be copied into this petition. It follows:

"NEW YORK LIFE
INSURANCE COMPANY

A MUTUAL COMPANY
AGREES TO PAY

TO *A. MACK WILDER during his life time and upon his death to* ~~and~~ *JOSEPHINE U. WILDER, if she be living,* the Annuitants, ~~jointly and after the first death to the survivor of them during the lifetime of such survivor,~~

"AN ANNUITY OF * * * *TWELVE HUNDRED* * * * Dollars payable in equal *Monthly* payments of * * * *ONE HUNDRED* * * * Dollars each; the first payment to be made on the *First* day of *August* Nineteen Hundred and *thirty-four* if either of the Annuitants is then living, and subsequent payments on the *First* day of *Each Month* in every year thereafter, said Annuity terminating with the last *Monthly* payment preceding the death of the last surviving Annuitant. No proportionate annuity payment will be made to the day of death of the last surviving Annuitant.

"If annuity payments are to be made to any one other than the Annuitants, or if the Company's check for any annuity payment is not to be endorsed personally by the Annuitants, the Company reserves the right to require satisfactory evidence that both or that the survivor of the said Annuitants is living on the date of the annuity payment falls due.

"This Annuity is granted upon the declaration that the Annuitants were born on the *Sixth* day of *August,* One Thousand *eight hundred seventy-eight* and on the *Tenth* day of *January,* One Thousand *eight hundred eighty-seven* respectively, and if such declaration shall be found incorrect then the amount of Annuity payable under this contract shall be such as the single premium paid would have purchased at the correct ages. Any overpayment or overpayments by the Company, with interest thereon at the rate of six per cent (6%) per annum, shall be charged against the payments to be made after adjustment.

"This policy constitutes the entire contract between the parties and does not participate in the surplus of the Company.

"All benefits under this contract are payable at the Home Office of the Company in the City and State of New York.

"No agent is authorized to make or to modify this contract.

"The reserve held by the company for this Annuity Contract shall be calculated on the Combined Annuity Tables, with interest at 4%.

"This contract is made in consideration of the payment in advance of the single premium of * * * *TWENTY-TWO THOUSAND FOUR HUNDRED FOURTEEN* 30/100 * * * Dollars to be made only by bank draft or certified check to the order of New York Life Insurance Company, in exchange for its official premium receipt signed by the President, a Vice-President, a Second Vice-President, a Third Vice-President, a Secretary or the Treasurer of the Com-

pany and counter-signed by the Cashier of its Branch Office.

"IN WITNESS WHEREOF the NEW YORK LIFE INSURANCE COMPANY has caused this contract to be signed this *Fifth* day of *July* Nineteen Hundred and *thirty-four*.

"Eighteen words struck out before signing.

(S.) THOMAS A. BUCKNER,
President.

(S.) FREDERICK M. JOHNSON,
Secretary.

Adapted.

J. & S. A.-S. P.
930-264.
Ages: {55¾ / 47¼}
Examined

_____MR.
MM.

_____,
Registrar."

On the back of the contract, the following appears:

"*NEW YORK*
LIFE
INSURANCE
COMPANY

Home Office:
51 Madison Avenue, Madison Square
New York, N. Y.

No. 51431

Joint and Survivor

ANNUITY POLICY

on the lives of

A. MACK WILDER

and

JOSEPHINE U. WILDER

Ages { 55¾ years
47¼ years

Monthly Annuity Payments of
$100.00 *each*
Single Premiums $22414.30.

SHREVEPORT Branch

Joint and Survivor Annuity. Single Premium.
Non-participating. 930-264 Adapted.
L. "

Respondent determined the value of the four contracts at the date of decedent's death to be $104,356.24, and included one-half of that amount in the taxable estate.

By the witness, Luther M. Byrd, the petitioner put in evidence these facts:

Witness has been connected with the New York Life Insurance Company of New York, the company that issued

the annuity contracts, for thirteen years, and is now Agency Director of that company at New Orleans. The four annuity contracts involved in this case are irrevocable. No right to change the beneficiaries was reserved. The contracts in question had no cash surrender value and no loan value. In fact, none of the indicia of ownership usually to be found in life insurance policies is to be found in the contracts in the present case.

From an adverse ruling by respondent of the question involved, petitioner prosecuted an appeal to the Board of Tax Appeals where the ruling of respondent was reversed. The Board of Tax Appeals held that no part of the value of the annuity contracts at the date of the death of the decedent should be included in his taxable estate for estate tax purposes. From this decision an appeal was prosecuted by respondent to the Circuit Court of Appeals for the Fifth Circuit. On March 20, 1941, the Circuit Court of Appeals rendered its decision reversing the Board of Tax Appeals and holding that the estate of the decedent was liable to estate taxes on one-half of the value of the annuity contracts at the date of the death of the decedent.

Reasons Relied On for Allowance of the Writ.

The reasons relied on for the allowance of the writ in this case are two-fold, viz.:

(a) The decision of the Circuit Court of Appeals is erroneous. It reverses the established rule at the Board of Tax Appeals in cases of this sort. In not less than three cases the Board of Tax Appeals has expressly held that annuity contracts such as we have here are not a part of the estate of the decedent, for estate tax purposes. The decision sought to be reviewed involves important questions of Federal law which should be settled by an authoritative decision of this Court. It involves questions of general

interest affecting not alone the estate tax liability of petitioner but also that of many others. It decides a Federal question in a way in conflict with the principle of applicable decisions of this Court. These questions are discussed in the accompanying brief for petitioner.

(b) Two cases involving the identical question with which we are concerned here were before the Board of Tax Appeals at the same time, the second case being that of *Charles F. Clise et al.* v. *Commissioner of Internal Revenue.* The *Clise* case was decided first, the decision appearing in 41 B. T. A. 820. It held that an annuity contract was not within the statute taxing the estates of decedents for estate tax purposes. From that decision an appeal was prosecuted by respondent to the Circuit Court of Appeals for the Ninth Circuit, where that case is now pending, undecided. The same decision was made by the Board of Tax Appeals in the instant case.

If the Circuit Court of Appeals for the Ninth Circuit should affirm the decision of the Board of Tax Appeals of this question, we would have the situation of two Circuits deciding an identical question differently—one in favor of the taxability of the annuity contracts for estate tax purposes and the other contrary to such taxability. If that condition should exist, petitioner would be clearly entitled to the writ herein asked for. This being true, petitioner respectfully requests that no action be taken on this application until the decision of the Circuit Court of Appeals for the Ninth Circuit in the *Clise* case shall have been rendered. Petitioner assumes that if the decision of the Ninth Circuit should affirm the Board of Tax Appeals on the question here involved, on that ground alone a writ of certiorari will be issued in the present case. If, however, that decision, also, should be adverse to the taxpayer, there will remain the question of whether petitioner

is entitled to the allowance of the writ herein sought, on the ground that the decision sought to be reviewed involves important questions of Federal law which should be settled by an authoritative decision of this Court. It may be added that the present case involves questions of general interest affecting not alone the estate tax liability of petitioner but that of many other taxpayers as well.

The premises considered, petitioner respectfully asks for the issuance of a writ of certiorari to review the decree of the Circuit Court of Appeals for the Fifth Circuit in this petitioner's case, and for the entry of such orders as may be incidental to that relief.

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